NO. 78-6386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

WILLIAM JAMES RUMMEL,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

BRIEF OF THE DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

This brief is being filed pursuant to Rule 42 of the Rules of the Supreme Court of the United States and is accompanied by written consent of both of the interested parties, William James Rummel and W. J. Estelle, Director, Texas Department of Corrections.

The Harris County District Attorney is an elected county official charged with the prosecution of state crimes. Tex. Rev. Civ. Stat., arts. 199, 326k-26. The Office of the District Attorney has secured numerous convictions under Article 63 of the Texas Penal Code of 1925 and § 12.42(d) of the Texas Penal Code of 1974. Moreover, numerous indictments under § 12.42(d) presently are being prepared for prosecution. Many of these criminal prosecutions under the Texas recidivist statute are directly affected by the opinion in *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (*en banc*).

Because this case presents fundamental questions concerning the validity and continuing vitality of the Texas recidivist statute, Amicus believes that it has a direct interest in the outcome of this case.

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CONSENT TO FILING OF AMICUS CURIAE BRIEF

We hereby consent, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, that an Amicus Curiae Brief may be filed by the District Attorney of Harris County, Texas, in the above styled and numbered cause.

/s/
SCOTT J. ATLAS
Attorney of Record for Petitioner

/s/
DOUGLAS M. BECKER
Attorney for Respondent

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TO THE HONORABLE JUSTICES OF SAID COURT:

Comes Now, John B. Holmes, Jr., District Attorney for Harris County, Texas, Amicus Curiae herein, and files this his brief in response to the brief of the Petitioner, William James Rummel.

QUESTIONS PRESENTED

Whether the imposition of a mandatory life sentence under the Texas recidivist statute is so disproportionate to the underlying offenses for which the Petitioner was convicted as to constitute cruel and unusual punishment.

SUMMARY OF ARGUMENT

The life sentence imposed in the instant case did not offend the disproportionate punishment corollary of the cruel and unusual punishment clause of the Eighth Amendment. *Cf., Coker v. Georgia*, 97 S.Ct. 2861, 2865 (1977). The court should exercise judicial restraint and affirm the judgment of the United States Court of Appeals for the Fifth Circuit *en banc*.

STATEMENT OF CASE AND FACTS

In light of the statement of facts recited by the Texas Court of Criminal Appeals in *Rummel v. State*, 509 S.W.2d 630 (Tex. Crim. App. 1974), and the United States Court of Appeals, *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (*en banc*), neither a statement of the case nor a statement of facts is necessary.

ARGUMENTS AND AUTHORITIES

I. Evolution of the Texas Recidivist Statute

A. Legislative Enactments

In 1856 the Texas Legislature enacted a statute pertaining to habitual offenders. Paschal, I *Laws of Texas* 472 (1873). Article 2464 of the Texas Penal Code of 1856 provided:

> "Any person who shall have been three times convicted of a felony less than capital, shall, on such third conviction, be imprisoned to hard labor for life, in the penitentiary."

This provision was preserved verbatim in subsequent codifications of the Texas Penal Code. Texas Penal Code of 1879, art. 820; Texas Penal Code of 1895, art. 1016; Texas Penal Code of 1911, art. 1620.

In 1925 and 1974 the Texas legislature modified the former recidivist statute:

> "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." Texas Penal Code (1925), art. 63.
>
> * * * *
>
> "If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life." Texas Penal Code (1974), §12.42(d).

Section 12.42(d) of the 1974 Penal Code retains the substance of the former provisions and codifies the judicial construction in cases such as *Rogers v. State*, 325 S.W.2d 697 (Tex. Crim. App. 1959). In essence, a conviction under §12.42(d) requires two prior felony convictions. The second previous felony conviction must be committed after the first previous felony conviction became final; likewise, the felony offense which forms the basis of the recidivist indictment must be committed after the second previous felony conviction became final. *E.g., Porter v. State*, 566 S.W.2d 621 (Tex. Crim. App. 1978); *Spiers v. State*, 552 S.W.2d 851 (Tex. Crim. App. 1977); *Hickman v. State*, 548 S.W.2d 736 (Tex. Crim. App. 1977).

B. Judicial Review

The Texas Court of Criminal Appeals consistently has rejected challenges to the constitutionality of the recidivist statute and, thus, has approved the imposition of life prison terms as punishment for crimes comparable to those which form the basis of the indictment filed in the instant case. In *Passmore v. State*,

544 S.W.2d 399 (Tex. Crim. App. 1976), the court rejected a claim that the recidivist statute offends the constitutional guarantee against double jeopardy. *Accord, Schultz v. State*, 510 S.W.2d 940 (Tex. Crim. App. 1974). Similarly, the court has rejected summarily Eighth Amendment challenges to the constitutionality of the recidivist statutes. *E.g., Shaver v. State*, 496 S.W.2d 604 (Tex. Crim. App. 1974) (shoplifting); *Rogers v. State*, 486 S.W.2d 786 (Tex. Crim. App. 1972) (burglary); *Flores v. State*, 472 S.W.2d 146 (Tex. Crim. App. 1971) (attempted burglary); *Vandall v. State*, 438 S.W.2d 578 (Tex. Crim. App. 1969) (passing a forged instrument); *Young v. State*, 341 S.W.2d 911 (Tex. Crim. App. 1960) (felony theft); *Ex Parte Reyes*, 383 S.W.2d 804 (Tex. Crim. App. 1964) (passing a forged instrument); *Mackie v. State*, 367 S.W.2d 697 (Tex. Crim. App. 1963) (felony theft); *Redding v. State*, 265 S.W.2d 811 (Tex. Crim. App. 1954) (felony theft).

The Supreme Court of the United States, recognizing that its role is not that of a legislator or rule-maker, exercised judicial restraint and rejected an attack on the constitutionality of the Texas recidivist statutes. *Spencer v. Texas*, 385 U.S. 554, (1967):

> "Tolerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate here. The rate of recidivism is acknowledged to be high, a wide variety of methods of dealing with the problem exists, and experimentation is in progress. The common-law procedure for applying recidivist statutes, used by Texas in the cases before us, which require allegations and proof of past convictions in the current trial, is of course, the simplest and best-known procedure . . . . To say that the two-stage jury trial as in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment . . . . To take such a step would be quite beyond the pale of this court's proper function in our federal system." 385 U.S. 554, 566-68 (1967).

In a more recent review of the Texas recidivist statute, Judge Thornberry reiterated the importance of judicial restraint:

> "Perhaps, if I were a prosecutor, I would not have sought an indictment charging the defendant with a habitual count; if I were a state lawmaker, I would vote to amend the statute so it would not be applied as it has been done here; or if I were governor of the State of Texas, I would consider the petitioner a prime candidate for clemency. But I do not hold these offices and my decision must be guided by the Eighth Amendment rather than my feelings of compassion and justice . . . . While it is well-settled that the Eighth Amendment circumscribes legislative powers to punish crime, the balance to be struck when a court enters this traditionally legislative field is not easily determined. The judicial function lies somewhere between abdication of fundamental responsibility in the guise of judicial restraint and the insertion of judicial conceptions of wisdom and propriety." *Rummel v. Estelle*, 568 F.2d 1193, 1201-02 (5th Cir. 1978) (Thornberry, J., dissenting), rev'd *en banc* 587 F.2d 651 (5th Cir. 1978).

Accordingly, the Texas recidivist statute has been reviewed by a variety of forums. *E.g., Spencer v. Texas*,

385 U.S. 554 (1967); *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (*en banc*), cert. granted 47 U.S.L.W. 3760 (U.S. May 22, 1970); *McCardell v. State*, 557 S.W.2d 289 (Tex. Crim. App. 1977). In each case, the courts exercised judicial restraint and rejected Eighth Amendment challenges to the constitutionality of the Texas recidivist statute. *See*, Comment, "A Closer Look at Habitual Criminal Statutes," 16 *Am. Crim. L. Rev.* 275, 282-92 (1979); Note, "Recidivist Laws Under the Eighth Amendment," *Toledo L. Rev.* 606, 609-17 (1979).

C. Recent Review of Long Prison Terms in Other Jurisdictions

Drawing on the concurring opinions of the capital punishment case *Furman v. Georgia*, 408 U.S. 238 (1972), the Fourth Circuit developed a four-prong test for disproportionate sentences. *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973); *see*, Note, "Recividist Laws Under the Eighth Amendment," in 10 *Toledo L. Rev.* 606, 621-23 (1979). In determining that a West Virginia statute violated the Eighth Amendment, the court considered cumulatively (1) the nature of the offense, (2) the legislative purpose that underlies the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. The Fourth Circuit, however, has failed to apply the four-prong test of *Hart v. Coiner* with regularity and consistency; instead, the court has narrowed the application of *Hart* in recent decisions. *Cf.*, *Rummel v. Estelle*, 587 F.2d 651, 656 n.8 (5th Cir. 1978); *but see*, *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979). Moreover, the Fifth Circuit and the Second Circuit have refused an intact application of the four-prong *Hart v. Coiner* analysis. *E.g.*, *Rummel v. Estelle*, 587 F.2d 651, 660-61 (5th Cir. 1978); *Carmona v. Ward*, 576 F.2d 405, 409-10 (2nd Cir. 1978). Both circuits recognized the legislative prerogative and held that the legislature's decision concerning the

appropriate penal sanction did not trangress the Eighth Amendment.

Amicus submits, therefore, that the constitutional limitation on non-capital criminal sanctions was accurately expressed in *Rummel v. Estelle*:

> "[A] punishment could be cruel and unusual if it is so greatly disproportionate to the offense committed as to be *completely arbitrary and shocking to the sense of justice.*" 587 F.2d 651, 655 (5th Cir. 1978). (Emphasis added)

See also, *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979) (Widener, J., dissenting), citing *Yeager v. Estelle*, 489 F.2d 276 (5th Cir. 1973), cert. denied 416 U.S. 908 (1974).

II. The Texas Recidivist Statute Does Not Offend the Eighth Amendment.

A. The Eighth Amendment: Its Evolving Meaning

The history of the Eighth Amendment is well-known. *Furman v. Georgia*, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring). Nevertheless, jurists have recognized the immense complexities inherent in a determination of the exact scope of the cruel and unusual punishment clause of the Eighth Amendment. *Compare*, *Trop v. Dulles*, 356 U.S. 86, 99 (1958), with *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878). Punishment by torture and lingering death clearly is prohibited by the cruel and unusual punishment doctrine; however, the "*mere* extinguishment of human life" and long prison terms are not violative per se of constitutional guarantees. *E.g.*, *In Re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, *supra*. While capital punishment and long prison terms generally are permissible under the Eighth Amendment, such punishments can be imposed in a manner that is offensive to human dignity or contrary to "evolving

standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. United States*, 217 U.S. 349, 379 (1910).

The Supreme Court of the United States recently has held that capital punishment is not unconstitutional per se. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). Finding that death penalty statutes are not unconstitutional per se, the Supreme Court reviewed state legislation and determined that the punishment was not disproportionate in relation to the crime for which it was imposed:

> "But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

See also, Jurek v. Texas, 428 U.S. 262, 265-67 (1976); *Proffitt v. Florida*, 428 U.S. 242, 245-46 (1976). The disproportionate corollary of the Eighth Amendment was subsequently applied in *Coker v. Georgia*, 97 S.Ct. 2861, 2865-67 (1977):

> "In sustaining the imposition of the death penalty in *Gregg*, however, the court firmly embraced the holdings and dicta from prior cases [citations omitted] to the effect that the Eighth Amendment bans not only those punishments that are *barbaric* but also those that are *excessive* in relation to the crime committed. Under *Gregg*, the punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to

> the severity of the crime. A punishment might fail the test on either ground."

Coker v. Georgia, therefore, establishes a two-prong test of disproportionality under the Eighth Amendment: the punishment of death must be neither grossly out of proportion with the severity of the criminal behavior nor purposeless in its imposition of pain and suffering.

B. Application of *Coker v. Georgia*

1. *Coker v. Georgia* is not applicable to non-capital felonies.

Coker v. Georgia, 97 S.Ct. 2861 (1977), applied the disproportionate corollary of the Eighth Amendment and held that capital punishment is "an excessive penalty for the rapist who, as such, does not take human life." 97 S.Ct. 2861, 2869. The majority opinion suggests that the two-prong test for disproportionate punishments may be limited to death penalty cases which are unique in their severity and irrevocability. *Coker v. Georgia*, 97 S.Ct. 2861, 2869 (1977), citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *see also, Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring); 354 U.S. 1, 54-56 (1957) (Frankfurter, J., concurring). The instant case involves life imprisonment, a revocable punishment significantly less severe than death. Eligibility for parole under Article 42.12(15) of the Texas Code of Criminal Procedure strongly detracts from the severity of the punishment. Appellate review, as well as habeas corpus and the powers of clemency and pardon, guarantee constant reviewability of the punishment and procedures which underlie the Petitioner's conviction.

Accordingly, Amicus respectfully submits that the two-prong test of *Coker v. Georgia* should not be applied in non-capital felony cases that are scrutinized solely because of the length of the prison term.

2. The Texas recidivist statute does not violate the disproportionate punishment corollary of the Eighth Amendment.

a. Contribution to acceptable goals of punishment

If *Coker v. Georgia, supra*, requires a determination of whether life imprisonment with eligibility for parole is "excessive" in relation to the crime committed, Amicus submits that the Texas statutes satisfy the two-prong test of *Coker v. Georgia, supra.* Initially, *Coker* requires a determination of whether a punishment contributes to acceptable goals of punishment -- deterrence, rehabilitation, retribution, and protection of society.

(1) rehabilitation

The Texas Court of Criminal Appeals recognizes that the recidivist statute is "reformatory" in nature. *E.g., Rogers v. State*, 333 S.W.2d 383, 385 (Tex. Crim. App. 1960); *Ellis v. State*, 115 S.W.2d 660, 663 (Tex. Crim. App. 1938). After being convicted of his first two felony offenses, the recidivist is encouraged by society to rehabilitate. The recidivist is given the option to either pursue a law-abiding lifestyle in conformity with Texas penal laws or, upon being convicted of a felony for the third time, to return to prison for a term of years calculated under Article 42.12 of the Texas Code of Criminal Procedure and Article 6184L of the Texas Revised Civil Statutes.

(2) deterrence

The Texas Recidivist Statute contributes to the deterrence of crime. The statute deters the specific offender from future acts of misconduct, and it deters others from beginning the life of a career criminal. When the offender is convicted of his second felony offense, the mandatory life prison term is a legitimate

legislative response to encourage rehabilitation. Moreover, if the felony offender is unable to rehabilitate or reform after being previously convicted of two other felony offenses, the mandatory life prison term with eligibility for parole is a reasonable legislative response to prevent future misconduct by the habitual felony offender.

(3) protection of society

The Texas Recidivist Statute promotes a third acceptable goal of punishment, the protection of society. "Constitutionality and Construction of Statute Enhancing Penalty for Second or Subsequent Offense," 58 ALR 20, 25-26 (1929); *see also*, 82 ALR 345, 349 (1933); 132 ALR 91 (1941); 132 ALR 673 (1942). The legal commentary analyzes recidivist statutes and concludes that there is a reasonable basis for the additional punishment because "the subsequent crimes tend to show that the criminal tendency had become imbedded in the accused, and the protection of society demanded a more severe punishment for him than the one who was the first offender." 58 ALR 20, 26 (1929). An Iowa court rejected an Eighth Amendment challenge and held that

> "[I]t is not for us to invade the province of the Legislature, and to say that the punishment is out of proportion to the nature of the particular offense. More and more we are coming to the notion that punishment should be made to fit the criminal rather than the crime. Surely, when one by his conduct has indicated that he is a recidivist, there is no reason for saying that society may not protect itself from future ravages. It is neither cruel nor unusual to say that a habitual criminal shall receive a punishment based upon his established proclivities to commit crime." *State v. Dowden*, 115 N.W. 211, 212 (Io. 1908).

A California court rejected similar Eighth Amendment contentions and affirmed the punishment assessed in a case similar to that at bar:

> "[T]he legislature may require the courts to take into consideration the persistence of the defendant in his criminal course . . . . It is the first and highest duty of government to secure its citizens the enjoyment of their lives and property against the unlawful aggression of the criminal class, who, if unrestrained, would despoil the law-abiding of both life and property. When a person has proven himself immune from the ordinary modes of punishment, then it becomes the duty of government to seek some other mode to curb his criminal propensities that he might not continue to future inflict himself on law-abiding members of society. This we think may be done even to the extent of depriving him permanently of his liberty." *In Re Rosencrantz*, 271 P. 902, 904-05 (Calif. 1928).

The California statute provided for life imprisonment without the possibility of parole after the fourth felony conviction. In *Rosencrantz* the offender was convicted of a series of crimes against property similar to those presented in the case at bar: fraudulently making and uttering a check upon a bank without sufficient funds to meet same; fraudulently issuing a fictitious check; fraudulently drawing a check; and, making and passing a fictitious instrument. The punishment was not disproportionate to the crimes committed in light of the societal interest in protecting itself against repeated felonious assaults against property.

(4) retribution

Retribution is a fourth acceptable goal of punishment:

> "Retribution in punishment is an extreme expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime." A. Goodhart, *English Law and Moral Law* 92-93 (1953).

Accordingly, the principle of retribution is an acceptable goal of punishment which must not be ignored. Society is entitled to express its aversion to habitual criminal activity by attaching a more severe punishment to same.

(5) conclusion

It is clear that the Texas Recidivist Statute contributes to each of the four acceptable goals of punishment: rehabilitation, deterrence, protection of society, and retribution. Therefore, the imposition of a life sentence, with the possibility of parole, does not represent a "needless imposition of pain and suffering," and the Texas scheme of punishment does not violate the disproportionate corollary of the Eighth Amendment. *E.g., Carmona v. Ward*, 576 F.2d 405 (2nd Cir. 1978), cert. denied 99 S.Ct. 874 (1979).

b. Proportionality of the punishment

The second prong of *Coker* involves a determination of whether the punishment of life imprisonment, with the opportunity for parole is "grossly out of proportion to the severity of the crime." In *Coker* the court found death to be "grossly disproportionate" to the severity of the crime of rape. To reach the conclusion, the court noted the unique aspects of capital punishment -- severity and irrevocability. 97 S.Ct. 2861, 2869 (1977). The instant case involves life imprisonment, a revocable punishment. Furthermore, eligibility for parole under

Article 42.12(15) of the Texas Code of Criminal Procedure and good time under Article 6184L of the Texas Revised Civil Statutes strongly detracts from the severity of the punishment. *See, Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring); 354 U.S. 1, 54-56 (1957) (Frankfurter, J., concurring). The Texas recidivist statute, even if not particularly tailored to the precise gravity of the underlying offense, is a legitimate legislative effort to make the punishment fit the criminal. When a person has proven himself immune to the ordinary modes of punishment and continues a course of criminal misconduct, the government is duty-bound to secure its law-abiding citizens the protection of their lives and property by developing a method to curb recidivist criminal propensities. *E.g., In Re Rosencrantz, supra; State v. Dowden, supra.*

The Petitioner's argument is erroneously predicated on the claim that he was imprisoned for life for theft of amounts aggregating approximately $230.00. The Texas recidivist statute, however, primarily focuses upon the inability of an individual to reform, not the extent of the individual Complainant's suffering. *See, Carmona v. Ward*, 576 F.2d 405, 411 n.9 (2nd Cir. 1978); *Ellis v. State*, 115 S.W.2d 660, 663 (Tex. Crim. App. 1938). Amicus respectfully submits that life imprisonment, with the eligibility for parole, is not "excessive" in relation to the criminal behavior being punished.

It is significant that ten other states provide mandatory life sentences for a recidivist -- West Virginia, Washington, Colorado, New Mexico, Wyoming, Delaware, Illinois, Nevada, South Carolina, and Tennessee. Note, "Recidivist Laws Under the Eighth Amendment," 10 *Toledo Law Review* 606, 610 (1979). Moreover, several states provide for life sentences without the possibility of parole -- Alabama, Arizona, Delaware, Georgia, and Tennessee. *Rummel v.*

Estelle, 587 F.2d 651, 657 n.15 (5th Cir. 1978). Under these circumstances, Texas law is not "grossly disproportionate" in comparison with similar recidivist legislation in sister jurisdictions. The eligibility for parole and good time strongly militate against any disproportionate attributes of the mandatory life imprisonment. *See, Carmona v. Ward*, 576 F.2d 705 (2nd Cir. 1978); *Brown v. Wainwright*, 574 F.2d 200, 201 (5th Cir. 1978); *Rodriguez v. Estelle*, 536 F.2d 1096, 1097 (5th Cir. 1976).

c. The Texas scheme of punishment

(1) the allegations

An indictment alleging an offense punishable under the habitual offender statute requires the allegation of two prior felonies both of which must have become final before the commission of the third felony offense underlying the prosecution. *E.g., Porter v. State*, 566 S.W.2d 621 (Tex. Crim. App. 1978); *Spiers v. State*, 552 S.W.2d 851 (Tex. Crim. App. 1977); *Hickman v. State*, 548 S.W.2d 736 (Tex. Crim. App. 1977). The indictment does not include the offender's entire criminal history, but only alleges the three offenses necessary under §12.42(d) of the Texas Penal Code. Petitioner's entire criminal history -- while material to the prosecutor's exercise of discretion when electing to go forward with a habitual case -- is immaterial to the State's pleading under §12.42(d).

Accordingly, when the reviewing court considers the constitutionality of the punishment imposed, courts may look beyond the indictment. The Amicus Brief filed by the Bexar County District Attorney in the United States Court of Appeals indicates that the indictment filed in Petitioner's case did not fully reflect the extent of Petitioner's criminal history. Brief of the criminal District Attorney of Bexar County, Texas, as Amicus Curiae at 2-3 n.1, *Rummel v. Estelle*, 587 F.2d 651 (5th

Cir. 1978) (*en banc*).

(2) the punishment

The Texas scheme of punishment should not be viewed in a vacuum but, rather, should be viewed in its entirety. The recidivist, sentenced to life imprisonment, is eligible for parole in less than twenty years. Tex. Code Crim. Proc., art. 42.12(15); Tex. Rev. Civ. Stat., art. 6184L. Because the Texas scheme of punishment provides for the possible rehabilitation of the recidivist defendant through eligibility for parole, the scheme militates against any cruel and unusual aspects of life imprisonment.

To assume any impropriety or discrimination by the Texas Board of Pardons and Parole is improper. *See, Craft v. Texas Board of Pardons and Parole*, 550 F.2d 1054 (5th Cir. 1977). Amicus respectfully submits that the court should consider the entire scheme of punishment when considering whether punishment pursuant to the recidivist statute was constitutional as applied to the Petitioner in the instant case. *Carmona v. Ward*, 576 F.2d 405, 413-14 (2nd Cir. 1978); *Rummel v. Estelle*, 587 F.2d 651, 657 (5th Cir. 1978), citing *Rodriguez v. Estelle*, 536 F.2d 1096, 1097 (5th Cir. 1976). The possibility of parole promotes the "reformatory" goals of punishment, and the State of Texas, through its laws pertaining to pardon and parole, does not abandon the hope of rehabilitating the recidivist offender. *See, Carmona v. Ward, supra.*

C. Conclusion

Amicus respectfully submits that the Texas recidivist statute is neither facially defective nor unconstitutional as applied. A fundamental principle of constitutional law is that statutes are presumed valid, and the Petitioner attacking the constitutionality of a legislative enactment has the burden to show otherwise. *E.g., Ex*

Parte Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978); *cf., Weems v. United States*, 30 S.Ct. 544, 553-54 (1910). In the instant case, Petitioner has failed to discharge his burden with respect to the constitutionality of the recidivist statute by showing that the statute either is "grossly out of proportion to the severity of the crime" or fails to make a "measurable contribution to acceptable goals of punishment." *Coker v. Georgia*, 97 S.Ct. 2861, 2865 (1977).

Petitioner primarily relies on *Weems v. United States, supra.* In *Weems* the Supreme Court declared unconstitutional a sentence under the Phillippine Code of Criminal Procedure which allowed the imposition of a fifteen-year sentence to hard and painful labor in chains for falsifying a public and official document. Article 2464 of the Texas Penal Code of 1856 provided that the habitual offender would be "imprisoned to hard labor for life, in the penitentiary." The language was modified in the Texas Penal Code of 1925 to eliminate the "hard labor" aspect of the recidivist statute. Amicus respectfully submits that the cruel and unusual aspect of the punishment in *Weems* pertained to the penalties of *cadena temporal*, not the mere length of the sentence imposed.

Petitioner also relies on *Coker v. Georgia*, 433 U.S. 584 (1977), which adopted the disproportionate corollary of the Eighth Amendment's cruel and unusual punishment clause. In *Coker* the Supreme Court cites *Weems v. United States, supra; Trop v. Dulles*, 356 U.S. 86 (1958); *Robinson v. California*, 370 U.S. 660 (1962); and *Furman v. Georgia*, 408 U.S. 238 (1972). The authorities do not pertain to the length of prison terms per se but, rather, concentrated on the manner of the imposition of the sentence. For example, *Furman v. Georgia, supra*, pertained to the imposition of capital punishment in an arbitrary and capricious manner. *Robinson v. California, supra*, involved a ninety-day

sentence imposed for the mere addiction to drugs. *Compare, Powell v. Texas,* 392 U.S. 514 (1968). In *Robinson* the court concluded that the mere addiction did not constitute any criminal offense and that punishment therefor constituted a violation of the cruel and unusual punishment clause of the Eighth Amendment. In *Trop v. Dulles, supra,* a majority of the court was unable to agree on whether the loss of citizenship constituted cruel and unusual punishment. Justice Brennan concurred in the result and concluded that the statute which authorized deprivation of citizenship exceed Congress' legislative powers. Therefore, the cases cited as authority for the disproportionate corollary in *Coker v. Georgia, supra,* are not dispositive of the instant case which pertains to the mere length of Petitioner's prison term.

The cruel and unusual punishment clause of the Eighth Amendment has never been applied by this court to invalidate a state statute merely because the Court feels that the prison term is too severe or greater than one that it would have imposed. *E.g., Davis v. Davis,* 585 F.2d 1226, 1229 (4th Cir. 1978), rev'd *en banc* 601 F.2d 153 (4th Cir. 1979). Amicus respectfully submits that judicial restraint should be exercised in cases pertaining to the mere length of prison terms authorized by state statute. A prison term should not be reversed unless it is "completely arbitrary and shocking to the sense of justice." *Rummel v. Estelle,* 587 F.2d 651, 655 (5th Cir. 1978) (*en banc*). Petitioner's application for habeas corpus relief, therefore, was properly denied by the United States District Court and the United States Court of Appeals.

III. The Policy of Judicial Restraint Avoids the Imposition of Unwarranted Burdens on the State Criminal Justice System

A. Judicial Restraint

By deciding that the Texas Recidivist Statute was

constitutional as applied in the instant case, the United States Court of Appeals refused to substitute its view of acceptable felony offenses for enhancement purposes and refused to require the State to redefine felony offenses which it considers "relatively trivial." A contrary opinion would fail to present adequate guidelines for subsequent judicial determination:

> "Surely the principle of the decision cannot be the dollar sign, and the court gives no other indication where the line is to be drawn. Whatever sociological analysis I might apply to this case, I cannot avoid the conclusion that with this decision we stand on the brink of the slippery slope in its most classic sense." *Rummel v. Estelle,* 568 F.2d 1193, 1202 (5th Cir. 1978) (Thornberry, J., dissenting), rev'd en banc 587 F.2d 651 (5th Cir. 1978).

* * * *

> "The questions arising are innumerable; but to me, the majority leaves them unanswered to be determined on a case-by-case basis." *Hart v. Coiner,* 483 F.2d 136 (4th Cir. 1973) (Boreman, J., dissenting).

To adopt Petitioner's position, the felony offender is incapable of knowing which felony offenses can be used for enhancement purposes. This effect detracts from the deterrent aspect of the statutory scheme for punishing habitual offenders.

The Supreme Court of the United States consistently has recognized that prominence is given to the power of the Legislature to define crimes and affix punishment, for they are in the superior position to detect societal maladies and to develop a scheme designed to ameliorate the problem. *See, Coker v. Georgia,* 97 S.Ct. 2861, 2877-78 (1977) (Burger, C.J. dissenting); *Weems v.*

United States, 30 S.Ct. 544, 551-54 (1910). Accordingly, federal courts should not interfere with the legislative scheme of punishment for habitual offenders.

B. The Unwarranted Burden

To adopt Petitioner's position would impose on Texas courts the obligation to review all past recidivist convictions on a case-by-case basis to determine the presence of any cruel and unusual aspects of the punishment. Such a ruling would constitute an unwarranted intrusion which would interfere with the State's administration of criminal justice. *See, Hart v. Coiner*, 483 F.2d 136, 149 (4th Cir. 1973) (Boreman, J., dissenting).

IV. Conclusion

Amicus respectfully submits that Petitioner's contention represents a threat to the constitutional power of state legislatures to define crimes and affix punishments, and to the well-founded principle of judicial restraint. Additionally, Petitioner's contention threatens the efficient administration of the criminal justice system by imposing the obligation of case-by-case review of all past habitual convictions.

Application of the Texas Recidivist Statute in the instant case did not violate the disproportionate corollary of the cruel and unusual punishment provision of the Eighth Amendment. Amicus respectfully submits that the Texas recidivist statute does not offend the two-prong test applied in *Coker v. Georgia*, 97 S.Ct. 2861 (1977), and that the four-prong test of *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), is not constitutionally required. *Hart* should not be applied to invalidate the Texas recidivist statute and the decisions of the United States District Court and the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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